Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

DONALD D. BAILEY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

Respectfully submitted,

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26 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether a defendant's Sixth Amendment right to conflict-free counsel, when implicated by counsel's unmet demands for far greater legal fees tied to a threat that defendant would not receive the defense needed unless payment was made, warrant application of the *Cuyler* or *Strickland* standard?

2. Does a fair and just reason to withdraw a defendant's plea of guilty exist when his Sixth Amendment right to conflict-free counsel is violated where his attorneys abruptly change course advising defendant to plead guilty on the eve of trial after the lawyers' repeated demands for far greater legal fees had gone unmet?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner, Donald D. Bailey, asks this Court to issue a writ of certiorari to review the judgment of the Ninth Circuit Court of Appeals, entered on November 4, 2002, in its Memorandum decision denying petitioner's appeal.

OPINION AND ORDERS BELOW

The court's unpublished Memorandum decision, entered November 4, 2002, denying the appeal in *United States v. Donald D. Bailey*, No. 01-10667 (9th Cir. Nov. 4, 2002), is in Appendix A. The court's unpublished order denying petitioner's petition for rehearing, entered December 30, 2002, is in Appendix B.

BASIS FOR JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. §§ 1254(1) and 2101(c), to review the November 4, 2002, Memorandum decision of the Ninth Circuit Court of Appeals denying petitioner's direct appeal. This petition for writ of certiorari is timely because it is being filed and served within 90 days of the court of appeals' December 30, 2002, denial of petitioner's timely petition for rehearing in that court. Rules 13(3) and 29(2)(4), Rules of the Supreme Court of the United States.

CONSTITUTIONAL PROVISIONS AND RULES

The Sixth Amendment provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.

Fed. R. Crim. P. 32(e) provides in relevant part:

> A defendant may withdraw a plea of guilty or *nolo contendere*; . . after the court accepts the plea, but before it imposes sentence if . . the defendant can show a fair and just reason for requesting the withdrawal.[1]

STATEMENT OF THE CASE

On August 27, 1997, a grand jury returned a three-count indictment charging petitioner with the filing of false tax returns and the aiding and assisting of others in the filing of false tax returns in violation of 26 U.S.C. §§ 7206(1) and 7206(2). (CR 1)[2] On September

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[1] Rule 32(e) has been moved to Rule 11(d), effective Dec. 1, 2002.

[2] "CR" refers to the clerk's record. "RT" refers to the reporter's transcript. "ER" refers to appellant's excepts of record. "FER" refers to appellant's further excerpts of record.

14, 1997, attorney Stephen M. Dichter ("Dichter") filed a notice of appearance on petitioner's behalf. (CR 6)

Petitioner hired Dichter to represent him shortly before the return on the indictment. (RT 5-10-01 at 107) A written fee agreement, drafted by Dichter, provided that petitioner would pay at an hourly rate of $275. (*Id.* at 107-09)

On December 10, 1998, a grand jury returned a superseding indictment charging petitioner with additional tax evasion and false tax return offenses. (CR 36) The superseding indictment prompted a further written communication between Dichter and petitioner regarding the subject of attorney's fees. (ER 25) In short, Dichter wrote petitioner on December 17, 1998, stating he would need an additional retainer of $25,000 and predicting what the ultimate fee would be: "With a clear need for expert witness testimony on your behalf, I can easily predict that the ultimate bill in your case on a go-forward basis will probably be close to $100,000". (*Id.*) Petitioner construed this prediction that the ultimate bill would be close to $100,000 as a modification of the earlier fee agreement. (RT 4-17-01 at 31-34)

The case proceeded forward, and by November of 1999, with trial set for the following month, the government offered a plea agreement calling for petitioner to plead to one count of the indictment, count three, with an agreement that the remaining counts would be dismissed and that the government would stand silent at sentencing. (ER 26) Petitioner and Dichter discussed the proposal and Dichter advised petitioner to reject it which petitioner did. (RT 3-19-01 at 16-17; 5-10-01 at 130-32) In these plea discussions, Dichter told petitioner he had a "very defensible case." (RT 5-10-01 at 193)

A month later, in December of 1999, the trial was continued to May 2, 2000. (CR 67). This same month saw a return to the topic of attorney's fees between Dichter and petitioner. On December 10, 1999, and in response to additional billings from Dichter, petitioner wrote his lawyer stating:

> "Steve you are going to have to come back to the real world regarding this billing of yours.
> If I am to believe you (sic) billings you must have the entire staff of Bryan Cave in St. Louis and Phoenix working on my case. How can this be. I hired you to handle this case.

I will pay the October bill next week. But I would like you to call me regard (sic) this bill. I have paid you over $80,000. The total case was not to cost over $100,000. It would seen (sic) that there is no end in sight." (ER 27)

Dichter responded in a letter of his own informing petitioner that "I did not predict at the start of the case that the total fee would be $100,000; I predicted that, once the indictment was superseded, the cost *on a go-forward basis* would probably be about $100,000." (Emphasis in original). (ER 27A-B)

As the months passed and the May 2, 2000, trial date grew near, petitioner and Dichter feuded over the question of legal fees. (RT 3-19-01 at 46-49; 5-10-01 at 216-17) By March, petitioner had paid Dichter's firm $130,000 and felt this was well within the range of Dichter's prediction. (RT 3-19-01 at 44) In the face of this, Dichter made repeated demands for more money. (ER 28) Finally, on March 24, 2000, Dichter wrote petitioner informing him of the consequences of his failure to pay:

> "You are a direct person, so I will be direct. You owe my firm about $45,000 in fees and expenses. We are a (sic) about six weeks away from a trial that will cost at least $35,000-$40,000 in fees at my rate, plus expenses, to prepare for the type of trial that you want, and about $50,000-$75,000 in fees, plus expenses, to try the type of case you want me to try.... That is an estimated total of $160,000 to do the job you want done. The bottom line is that you need to pay for the defense you want to have .... What you need to be doing, as I have said in numerous communications over the last several years, is to provide me the money I have repeatedly told you I need. *If you continue (sic) refuse to meet my repeated demands for retainers in the amount necessary to cover my anticipated needs, it will clearly be impossible to put on the kind of defense your case needs.*" (Emphasis added). (ER 28)[3]

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[3] The March 24, 2000, letter Dichter sent petitioner is in Appendix C.

Having already paid $130,000, petitioner now faced demands from Dichter for an additional $160,000 six weeks prior to trial. (*Id.*) That would make the total fee to Dichter $290,000 or roughly three times the fee he had predicted. (ER 25) Furthermore, the message was clear - if petitioner wanted "the kind of defense your case needs" payment must be made, and soon. (ER 28)

A short digression is in order. In late 1999, petitioner hired attorney Michael D. Kimerer ("Kimerer") to also assist in his defense. (RT 3-19-01 at 64-66) Kimerer was brought on to handle parts of the case that petitioner felt Dichter should not do. (*Id.*) Petitioner paid Kimerer $45,000 in legal fees. (*Id.* at 66) Kimerer, much like Dichter, also made demands for additional monies in the month before trial, telling petitioner he would need another $50,000 to try the case. (*Id.* at 73)

By early April of 2000, petitioner had paid Dichter $130,000 and Kimerer $45,000 and yet faced demands for additional fees to Dichter of $160,000 and to Kimerer of $50,000. (RT 4-17-01 at 27) Having already paid $175,000 in fees, petitioner was told he must come up with an additional $210,000 for his lawyers to try the case. (*Id.* at 29)

Although not indigent, petitioner was a man of modest means as revealed by the presentence report prepared for the district court.[4] His gross income was approximately $100,000 with assets of $205,250 and liabilities of $334,144 creating a negative net worth of $128,894. Given the amount of money already paid towards his defense, petitioner was incapable of coming up with the additional $210,000 in the few short weeks before trial. (RT 4-17-01 at 27; 3-19-01 at 73)

Dichter testified what he meant by his statement that petitioner's failure to pay the additional $160,000 would result in it being impossible to put on the type of defense his case needed. (RT 5-10-01 at 124-26) Dichter stated that he would be unable to put on a "Cadillac defense" using the many resources of his firm but that nonetheless he would individually do his best to defend petitioner. (*Id.*) On cross exam, Dichter admitted he never communicated his notion of "Cadillac defense" to petitioner. (*Id.* at 218-19) Dichter conceded that he never

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[4] The presentence report is part of the record provided under seal by separate transmission to the Ninth Circuit. *See* Ninth Circuit Rule 30-1.8.

told petitioner he would give him a vigorous defense even if he did not pay the monies demanded. (*Id.* at 219)

Petitioner, for his part, testified that Dichter echoed the sentiments of his March 24 letter time and again, suggesting his defense would suffer without the monies demanded. (RT 3-19-01 at 71, 76; 4-17-01 at 36) Petitioner felt Dichter did not want to try the case and that he would not get a fair trial. (RT 3-19-01 at 87-89; 4-16-01 at 199-200)

The relationship between petitioner and Dichter further deteriorated and grew more hostile as the May 2 trial date approached. In the week preceding trial, petitioner traveled from his home in Tucson to Phoenix to work on his case in a separate area cordoned off by Dichter's firm for the file. (RT 3-19-01 at 74-75) That area became known as the "war room". (*Id.*) Working in that area together with petitioner was a person named Terry Haugen ("Haugen") who was his legal assistant. (*Id.* at 75)

Petitioner had hired Haugen on his own when he was unable to pay the fees of Dichter's legal assistant. (*Id.* at 70) Haugen was an independent paralegal who had never worked for either Dichter or Kimerer and who did not know petitioner prior to this case. (RT 4-17-01 at 94, 96-97)

Haugen was in the war room daily in the month prior to trial and had frequent opportunity to observe petitioner and Dichter together. (*Id.* at 98-99) Haugen testified that the relationship was acrimonious, that Dichter repeatedly made demands upon petitioner for more money, and threatened to sue petitioner if payment was not forthcoming. (*Id.* at 101) Haugen stated that based on his working with the file and communications with petitioner and the attorneys that it appeared the case was very defensible and everyone thought they had a good chance of winning. (*Id.* at 102-03) The defense had hired an expert witness out of St. Louis who it was thought would make "a very winnable case on all 25 counts." (*Id.* at 104)

In this context, the Thursday and Friday immediately preceding trial became important. On Thursday, government counsel contacted Dichter renewing discussions of a possible plea agreement. (RT 5-10-01 at 132-33) Similar to the proposal which had been rejected the year before, the government offered to let petitioner plead to one count, this time count four, with added stipulations that would restrict the guidelines such that petitioner would face no more than a six-month

sentence of imprisonment and allow him to continue his employment as a tax preparer. (*Id.* at 134; ER 29-36)

Petitioner spoke separately with Dichter and Kimerer about the plea proposal. (RT 3-19-01 at 77-80; 5-10-01 at 206-07) Each encouraged him to accept it. (*Id.*) Petitioner told both of his lawyers he was not interested and wanted to go to trial. (*Id.*)

The next day, Friday, petitioner's lawyers met with him in the war room for two to three hours. (RT 5-10-01 at 208; 4-17-01 at 106) They discussed the plea proposal and Haugen was present. (RT 4-17-01 at 105-06) The discussion between the lawyers and petitioner grew heated and lively with raised voices. (*Id.* at 110-11; RT 5-10-01 at 142-43) For the first time, Dichter told petitioner there was a good chance he would lose the case. (RT 3-19-01 at 84-86) Interlaced in this conversation were demands by Dichter and Kimerer for the $210,000 that had gone unpaid. (RT 4-17-01 at 106-07; 5-10-01 at 215)

Haugen testified regarding the Friday meeting in the war room. He heard petitioner repeatedly tell his lawyers he was innocent and asking "How can I plead guilty if I am innocent?" (*Id.* at 112, 114, 116) Dichter told petitioner flat outright "You are going to have to say you are guilty." (*Id.* at 145) Haugen believed petitioner was reluctant and uncomfortable with the prospect of pleading guilty. (*Id.* at 120, 145)

The lawyers eventually left the room leaving petitioner and Haugen behind. (*Id.* at 113) After sitting by himself for a long time, petitioner told Haugen to tell Dichter he would take the deal. (*Id.*) Haugen did as told and Dichter called the government's lawyers and the plea agreement was put together. (RT 5-10-01 at 141-42, 151-53)

On May 1, 2000, petitioner appeared before the district court and plead guilty. (ER 59-86) Sentencing was set for July 24, 2000. (*Id.* at 84)

Shortly after pleading guilty, petitioner spoke with Hugh Kelly ("Kelly") who was a long-time friend. (RT 3-19-01 at 61, 95) Petitioner had spoken with Kelly previously about the indictment and Kelly knew about the case. (*Id.* at 61-63) When petitioner told Kelly he plead guilty even though innocent, Kelly encouraged him to withdraw his plea. (*Id.* at 95)

Accordingly, petitioner wrote Dichter on July 16, 2000, a week before sentencing, telling him to rescind the plea agreement and have the matter set for trial. (ER 52) Dichter responded in a letter the

following day telling petitioner that neither he nor Kimerer would stay on the case and that petitioner would have to hire a new lawyer to represent him. (ER 53-54) Dichter notified the district court and the government of petitioner's desire to withdraw his guilty plea by pleading filed July 18, 2000. (CR 93)

Two days later, petitioner wrote Dichter again, retracting his earlier letter and stating he wished to keep the plea agreement. (ER 55) Petitioner feared he would have no lawyer if he withdrew his plea and that he better stick with the deal. (RT 3-19-01 at 98-100) Sentencing had been continued and was reset for August 16, 2000. (CR 94)

At the urging of his friend Kelly, petitioner spoke with several lawyers in Tucson and Phoenix regarding his case. (RT 3-19-01 at 100, 103, 106) One of the attorneys he contacted told petitioner he could easily withdraw his plea and that he would not have to demonstrate a reason for doing so. (*Id.* at 101-03)[5]

Armed with this information, petitioner wrote Dichter on August 9, renewing his earlier decision to withdraw his plea. (ER 56-58) There matters stood until petitioner retained the undersigned to represent him. A formal motion to withdraw plea of guilty under Fed. R. Crim. P. 32(e) was thereafter filed on February 20, 2001. (CR 108; FER 1-15)

In his motion, petitioner argued that the heated war room discussions about a plea agreement pitted his lawyers' economic self-interests to avoid a lengthy trial, for which they stood a likelihood of not getting paid, against petitioner's interest in a fair trial. (FER 10-12) Because petitioner's lawyers did not want to go to trial and face the likelihood of not receiving the additional fees, he argued it was likely that their handling of the war room plea discussions with Bailey were adversely affected by their pecuniary self-interest rather than their client's best interests. (*Id.*) Petitioner argued that his Sixth Amendment right to conflict-free counsel had been denied and that the presumed prejudice standard of *Cuyler v. Sullivan*, 446 U.S. 335 (1980), should apply. (*Id.*)

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[5] In the Ninth Circuit, that advice was good but only if the district court had not already accepted petitioner's plea of guilty. *United States v. Alvarez-Tautimez*, 160 F.3d 573, 576 (9th Cir. 1998). Unbeknownst to the attorney who gave this advice, the district court had already accepted petitioner's plea.

The government opposed petitioner's motion to withdraw his plea of guilty. (FER 39-54) The district court then held hearings on the motion on the following dates: March 19, April 16, April 17, April 23, May 9, May 10, May 15 and May 18. (CR 117, 126, 127, 129-133) At the conclusion of the May 18 hearing, the district court denied petitioner's motion (CR 133) finding that "it would be unreasonable for (petitioner) to believe that his lawyers were not going to defend him adequately" (ER 144) and that there was not a lot of evidence that the fee dispute "hampered or lowered" (*Id.*) the representation petitioner was going to get.

The district court findings never addressed the Sixth Amendment claim raised by petitioner that he had been denied conflict-free representation when his lawyers' repeated demands for far greater legal fees had gone unmet. (ER 137-146) The district court thereafter sentenced petitioner to one year of supervised probation, ordered him to pay a fine of $5,000 and directed that he complete 200 hours of community service within the year. (CR 148)

Petitioner appealed, challenging the trial court's rulings and arguing that his attorneys' repeated demands on the eve of trial for far greater legal fees, when tied to a threat that he would not receive the defense he needed unless payment was made, created an actual conflict and that this actual conflict adversely affected counsels' handling of the plea discussions when their demands for more money were unmet. Once again, petitioner argued that the *Cuyler* standard applied. Petitioner also argued that he made a sufficient showing of actual innocence before the district court and that he should be able to withdraw his plea of guilty for that additional reason.

The government, on appeal, argued against the Sixth Amendment violation and, regarding petitioner's claims of innocence, sought refuge in the district court findings. Regarding the Sixth Amendment claim, the government urged that the standard of *Strickland v. Washington*, 466 U.S. 668 (1984), rather than *Cuyler*, should apply.

A three-judge panel of the Court of Appeals denied the appeal with its Memorandum decision in *United States v. Donald D. Bailey*, No. 01-10667 (9th Cir., Nov. 4, 2002). *See* Appendix A. The three-judge panel did not address the *Cuyler* versus *Strickland* issue although it cited to *Cuyler* as well as *Mickens v. Taylor*, 122 S.Ct. 1237 (2002). (*Id.*)

The panel then held that petitioner "presented no evidence that his attorneys were not prepared to defend (him) vigorously at trial. We conclude that (petitioner) has not carried his burden of showing that the fee dispute with his attorneys adversely affected his representation." (*Id.*) As had the district court, the three-judge panel focused on whether petitioner's attorneys were prepared to defend him vigorously at trial instead of evaluating whether their *unmet* demands for additional legal fees had adversely affected their insistence that he plead guilty rather than go to trial. The panel also denied petitioner's petition for rehearing, in an unpublished order entered December 30, 2002. *See* Appendix B.

REASONS FOR GRANTING THE WRIT

The present case raises the issue addressed but left undecided in this Court's opinion in *Mickens v. Taylor*, 122 S.Ct. 1237, 1245-46 (2002): What standard, *Cuyler* or *Strickland*, should apply to conflicts outside multiple representation situations such as a conflict created by a lawyer who places his own economic self-interest above those of his client's interests? The court of appeals' opinion, while citing to *Cuyler* and *Mickens*, made no effort to resolve this issue. The case law of several circuits is in conflict on this question and review by this Court is warranted to create uniformity on an important aspect of Sixth Amendment jurisprudence.

Yet an additional reason why review should be granted is that the court of appeals' opinion erroneously focused on whether petitioner's attorneys were prepared to defend him vigorously at trial and thus never reached the Sixth Amendment issue presented which is whether counsels' unmet demands for far greater legal fees on the eve of trial adversely affected their insistence that petitioner plead guilty. Whether petitioner's attorneys were prepared to vigorously defend him at trial is hardly relevant to their economic desire to avoid that trial in the first instance by insisting that petitioner plead guilty. Because this issue has thus far evaded review, the writ should be granted to decide this important Sixth Amendment claim.

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I.

The Sixth Amendment right to conflict-free representation warrants application of the *Cuyler* standard to conflicts created by lawyers who place their own economic self-interest above those of their client's interests.

The Sixth Amendment entitles a criminal accused to the effective assistance of counsel, unhindered by any conflicts of interest with his client. *Cuyler v. Sullivan*, 446 U.S. 335 (1980); *Holloway v. Arkansas*, 435 U.S. 475 (1978). This right includes the right to be represented by an attorney with undivided loyalty. *Wood v. Georgia*, 450 U.S. 261, 272-73 (1981). It applies not only to trials, but also to representation at the plea bargaining stage such as the proceedings in petitioner's case. *Holloway*, 435 U.S. at 490.

The Court has determined that in most Sixth Amendment ineffective cases, the accused must show that his attorney's errors fell below an objective standard of reasonableness and prejudiced his case, which ordinarily means establishing a reasonable probability that counsel's errors changed the result of a proceeding. *Strickland v. Washington*, 466 U.S. 668, 686, 694 (1984). However, in multiple representation cases where counsel labors under a conflict of interest, prejudice is presumed if the defendant shows that an actual conflict of interest adversely affected his lawyer's performance. *Cuyler*, 446 U.S. at 348. The question presented in this case is what standard, *Strickland* or *Cuyler*, should apply to conflicts between lawyers and their client created where the lawyers' demands for additional fees go unmet and, on the eve of trial, the lawyers then insist the client plead guilty.

In *Mickens*, this Court assumed, but did not decide, that the *Cuyler* standard would apply to conflicts arising from successive, rather than multiple, representation. *Mickens*, 122 S.Ct. at 1245 ("The case was presented and argued on the assumption that [absent some exception for failure to inquire] *Sullivan* would be applicable - - requiring a showing of defective performance, but *not* requiring in addition [as *Strickland* does in other ineffectiveness-of-counsel cases], a showing of probable affect upon the outcome of trial"). Nonetheless, in *dicta*, the Court called into question application of the *Cuyler* standard to lawyer's conflicts of interest stemming from situations other

than multiple representation, *id.*, and concluded that even as to successive representation situations whether *Cuyler* applied was "an open question." *Id.* at 1245-46. These statements in *Mickens* left the Sixth Amendment landscape largely unsettled in cases dealing with a criminal accused's right to conflict-free counsel.

The Court should take the opportunity in this case to put to rest any doubts on this question and hold that *Cuyler*, and not *Strickland*, applies to conflicts of interest arising out of situations where the lawyer places his own economic self-interest above the interests of his client. The Circuits are sharply divided on the question of whether *Cuyler* or *Strickland* apply to conflicts where the lawyer's pecuniary self-interest is pitted against his client's interests in effective assistance. *Compare United States v. Hearst*, 638 F.2d 1190, 1193 (9th Cir. 1980), *cert. denied*, 451 U.S. 938 (1981) ("Sullivan's lawyer's conflict was based on multiple representation, whereas Hearst's was based on private financial interest. These differences are immaterial. We consider the rules laid down in Sullivan [Cuyler] to be directly applicable to the present case, and they should govern the case on remand."); *Winkler v. Keane*, 7 F.3d 304, 308 (2nd Cir. 1993), *cert. denied*, 511 U.S. 1022 (1994) (applying *Cuyler* standard to conflicts between lawyer and client caused by a fee agreement under which counsel would be paid an extra $25,000 if defendant was acquitted); *United States v. Marrera*, 768 F.2d 201, 205-09 (7th Cir. 1985), *cert. denied*, 475 U.S. 1020 (1986) (applying *Cuyler* to claim based on "conflict of interest between (the) lawyer's financial interest in proceeds from the movie rights and (defendant's) interest in acquittal"); *Caderno v. United States*, 256 F.3d 1213, 1218-19 (11th Cir. 2001) (applying *Cuyler* to "a conflict-of-interest argument based on a contention that counsel was concerned with his own financial interest throughout the trial, which resulted in his not providing the defendant with competent representation"); *Daniels v. United States*, 54 F.3d 290, 294-95 (7th Cir. 1995) (although noting *Strickland*, the court applied *Cuyler* to a claim that the attorney's pecuniary interests were adverse to his client's interests), *with United States v. O'Neil*, 118 F.3d 65, 72 (2nd Cir. 1997), *cert. denied*, 522 U.S. 1064 (1998) (while citing and relying on *Cuyler* for analysis, the court in *dicta* stated that *Strickland* provided the better analytical framework); *and United States v. Taylor*, 139 F.3d 924, 932 n. 8 (D.C. Cir. 1998) (stating that at least one other circuit had held that nonpayment of legal fees was more properly analyzed under *Strickland*).

The case that affords the most complete analysis to the *Strickland* versus *Cuyler* debate is *Beets v. Scott*, 65 F.3d 1258 (5th Cir. 1995) (*en banc*), *cert. denied*, 517 U.S. 1157 (1996). There, a sharply divided court held that *Strickland*, rather than *Cuyler*, applied to an economic conflict between lawyer and client stemming from a media rights fee agreement. 65 F.3d at 1268-72. The majority holding was severely criticized by Judge King who, writing for five judges, dissented urging that *Cuyler* was the appropriate framework for analyzing such conflicts. 65 F.3d at 1295-96 (King, J., dissenting). The *Beets* majority opinion came under scholarly attack. *See* Note, *Beets v. Scott*: The Fifth Circuit Adopts The *Strickland* Test To Deal With Ineffective Assistance Claims That Arise From Conflicts Of Interest That Do Not Involve Multiple - Or Serial - Client Representation, 70 Tul. L. Rev. 1689, 1704-05 (1995).

The Court should grant the writ in the present case to resolve conflict among the Circuits and to create uniformity on this important Sixth Amendment question. In doing so, this Court should adopt the *Cuyler* standard to govern the question of conflicts arising from a lawyer who places his own economic self-interest above the interests of his client. This is the logical extension of *Cuyler* and the multiple representation cases because the conflict in those cases was motivated by counsel's desire to earn additional fees by representing more than one client. Hence, creation of the *Cuyler* standard was prompted by a realization that a multiple representation conflict was a function of a lawyer's economic self-interest overriding his duty of loyalty to a client.

Similarly, in petitioner's case, it was his lawyers' economic self-interest which led to their demand for large sums of additional monies on the eve of trial and, further, it was that self-interest which, when their demands went unmet, led the lawyers to insist that petitioner plead guilty the day before trial even in the face of his protestations of innocence. For this reason, *Cuyler* should apply to petitioner's Sixth Amendment claims.

II.

A fair and just reason to withdraw petitioner's plea of guilty exists, and a Sixth Amendment violation is proven, where his lawyers abruptly changed course and advised petitioner to plead guilty only after their repeated demands for far greater legal fees had gone unmet.

Rule 32(e) provides that a defendant may withdraw a plea of guilty prior to sentencing for "a fair and just reason." Where a defendant shows that he has been denied effective assistance in connection with plea negotiations, a fair and just reason for withdrawal of a guilty plea has been met. *Doganiere v. United States*, 914 F.2d 165, 168 (9th Cir. 1990), *cert. denied*, 499 U.S. 940 (1991).

In rejecting petitioner's request to withdraw his guilty plea grounded upon a Sixth Amendment violation, the court of appeals below held: "(Petitioner) presented no evidence that his attorneys were not prepared to defend (Petitioner) vigorously at trial. We conclude that (Petitioner) has not carried his burden of showing that the fee dispute with his attorneys adversely affected his representation." *See* Appendix A. The panel's holding misconstrued petitioner's argument and, as a result, never addressed the precise Sixth Amendment claim that had been raised.

Simply stated, the issue which has thus far gone undecided is whether the attorneys' handling of the plea discussions with petitioner the day before trial was set to begin were adversely affected by their pecuniary interests given that their demands for additional legal fees had gone unmet. Whether petitioner's attorneys were prepared to vigorously defend him at trial is hardly relevant to their economic desire to avoid that trial in the first instance. Instead, because the lawyers' demands for far greater fees had gone unmet, they were highly motivated to avoid a lengthy trial at the risk of not getting paid. The evidence on this point is largely uncontradicted and yet the court below overlooked both the evidence and its legal significance regarding the Sixth Amendment claim.

Also overlooked by the panel below was that the attorneys' demands for large sums of additional legal fees on the eve of trial was inextricably tied to the quality of defense which the lawyers assured

petitioner he would not receive in the event payment was not forthcoming. Attorney Dichter's March 24, 2000, letter to petitioner, written five weeks before trial, created a linkage between the demand for far greater fees and the quality of defense petitioner could expect to receive: "If you continue (sic) refuse to meet my repeated demands for retainers in the amount necessary to cover my anticipated needs, it will clearly be impossible to put on the kind of defense your case needs." *See* Appendix C. Accordingly, this was far more than a mere fee dispute which festered between petitioner and Dichter.

A month later, and with the demand for additional fees having gone unmet, the conflict grew worse as the lawyers faced a lengthy trial for which they stood a likelihood of not getting paid. Thus, the issue was whether this conflict adversely affected their representation of petitioner when they abruptly changed course on the eve of trial insisting petitioner plead guilty. This substantial Sixth Amendment question has gone undecided and will escape review totally unless the Court grants the writ in the present case and holds that petitioner established a fair and just reason for withdrawal of his guilty plea.

CONCLUSION

For the foregoing reasons, petitioner respectfully requests the Court grant his petition for writ of certiorari.

Respectfully submitted this 31st day of March, 2003.

WATERFALL, ECONOMIDIS

By _____
James W. Stuehringer
Attorneys for Petitioner

APPENDICES

APPENDIX A

FILED
NOV 04 2002
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)
	) No. 01-10667
Plaintiff - Appellee,	) D.C. No. CR 97-676 TUC-FRZ
V.	)
	)
DONALD D. BAILEY,	) MEMORANDUM*
	)
Defendant - Appellant.	)
	)

Appeal from the United States District Court
for the District of Arizona
Frank R. Zapata, District Judge, Presiding

Argued and Submitted October 11, 2002
San Francisco, California
Before: TASHIMA, THOMAS, and PAEZ, Circuit Judges.

Donald D. Bailey appeals his conviction following a guilty plea, pursuant to a plea agreement, to one count of filing a false tax return in violation of 26 U.S.C. § 7206(1). We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

Bailey contends that, because he is actually innocent, the district court erred in denying his motion to withdraw his guilty plea before

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Cir. R. 36-3.

sentencing. We review the district court's decision to deny a defendant's motion to withdraw a guilty plea for abuse of discretion. United States v. Rios-Ortiz, 830 F.2d 1067, 1069 (9th Cir. 1987). A district court may permit withdrawal of a guilty plea prior to sentencing upon a showing by the defendant of any fair and just reason. Fed. R. Crim. P. 32(d). A defendant has no absolute right to withdraw his guilty plea. United States v. Signori, 844 F.2d 635, 637 (9th Cir. 1988). Rather, a motion to withdraw is committed to the sound discretion of the district court. Id. Although Bailey testified at the evidentiary hearing on the motion that he was actually innocent, the district court found his testimony not credible. Because the district court found the facts against Bailey, and those findings are not clearly erroneous, we conclude that the district court did not abuse its discretion in denying Bailey's motion to withdraw his guilty plea based on a claim of actual innocence. See United States v. Snider, 976 F.2d 1249, 1251 (9th Cir. 1992) (reviewing credibility determinations for clear error); Rios-Ortiz, 830 F.2d at 107 ("[T]his court has not overturned a denial of a motion to withdraw a guilty plea absent something more than the defendant's change of mind.").

Bailey also contends that the district court erred in rejecting his claim that a fee dispute with his attorneys created a conflict of interest and resulted in ineffective assistance of counsel. We review ineffective assistance of counsel claims de novo. United States v. Sager, 227 F.3d 1138, 1149 (9th Cir. 2000). When a defendant claims ineffective assistance based on a conflict of interest, the defendant must establish that "an actual conflict of interest adversely affected his lawyer's performance." Cuyler v. Sullivan, 446 U.S. 335, 348 (1980). Bailey presented no evidence that his attorneys were not prepared to defend Bailey vigorously at trial. We conclude that Bailey has not carried his burden of showing that the fee dispute with his attorneys adversely affected his representation. See Mickens v. Taylor, 122 S. Ct. 1237, 1244 n.5 (2002) ("An 'actual conflict,' for Sixth Amendment purposes, is a conflict of interest that adversely affects counsel's performance."). The district court's denial of Bailey's motion to withdraw his guilty plea was not an abuse of discretion.

The judgment of conviction is
AFFIRMED.

APPENDIX B

FILED
DEC 30 2002
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	No. 01-10667
Plaintiff - Appellee,	)	
	)	DC No. CR 97-0676-FRZ
v.	)	D.Ariz.,Tucson
	)	
DONALD D. BAILEY,	)	
	)	ORDER
Defendant - Appellant.	)	
	)	

Before: TASHIMA, THOMAS, and PAEZ, Circuit Judges.

The petition for panel rehearing is denied.

APPENDIX C

BRYAN CAVE LLP
TWO NORTH CENTRAL AVENUE
PHOENIX, ARIZONA 85004-4406
(602) 364-7000
FACSIMILE: (602) 364-7070

March 24, 2000

TELEFAXED
Donald D. Bailey, CPA
2343 B. Broadway, Suite 107
Tucson, AZ 85719

Re: Bailey adv. United States

Dear Don:

I have just finished the taxpayer evasion case, so I now have time to respond to your letter. I just spoke to Kimerer and found out that he has not yet filed a notice of appearance because you have not concluded your financial arrangements with him. Mike will be on vacation all of next week. And there will be no additional continuances in this case.

You are a direct person, so I will be direct. You owe my firm about $45,000 in fees and expenses. We are a about six weeks away from a trial that will cost at least $35,000-$40,000 in fees at my rate, plus expenses, to prepare for the type of trial that you want, and about $50,000 - $75,000 in fees, plus expenses, to try the type of case you want me to try. And that is taking into account that Mike Kimerer, who you will be paying separately, will be sharing the load. That is an estimated total of $160,000 to do the job you want done. The bottom line is that you need to pay for the defense you want to have. In this context, debating me about paralegal fees and travel time is a waste of both our time. What you need to be doing, as I have said in numerous communications over the last several years, is to provide me the money I have repeatedly told you I need. If you continue refuse to meet my repeated demands for retainers in the amount necessary to cover my

anticipated needs, it will clearly be impossible to put on the kind of defense your case needs. You simply should not continue to duck the issue

Yours very truly,

/s/

Stephen M. Dichter

cc: Mike Kimerer
Terry Haugen

SMD\